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No. 000

In The

Supreme Court of the United States

OCTOBER TERM, 1970

PORT OF PORTLAND, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION OF APPELLEES, SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY, TO AFFIRM

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No. 903

In The

Supreme Court of the United States

OCTOBER TERM, 1970

PORT OF PORTLAND, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION OF APPELLEES, SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY, TO AFFIRM

Appellees, Spokane, Portland and Seattle Railway Company (SP&S) and Union Pacific Railroad Company (UP) (sometimes collectively referred to as joint applicants), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, jointly move that the final order and judgment of the District Court be affirmed on the ground that the questions on which the appeal depends are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from a unanimous decision of a three-judge district court affirming the report and

order of the Interstate Commerce Commission (Commission) approving the acquisition of Peninsula Terminal Company (Peninsula) by SP&S and UP. In its report and order, the Commission prescribed labor and traffic protective conditions and denied the petitions for inclusion and trackage rights of Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) and Southern Pacific Transportation Company (SP), appellants in this case, said petitions being filed pursuant to Section 5(2) of the Interstate Commerce Act (49 USC 5(2)).

The Commission also denied the separate applications of SP for joint use under Section 3(5) of the Act (49 USCA 3(5)), of terminal facilities and/or UP main line facilities which SP would need to operate directly to and from the small interchange yard at North Portland where SP&S and UP tracks meet and then connect with Peninsula.

Peninsula is a small terminal railroad with 3.79 miles of main, side and interchange track serving 14 industries. Peninsula's track was originally established in the early 1900's as an essential part of the Portland Union Stockyards to facilitate handling of livestock and to provide a rail connection, through the North Portland Yard, with SP&S and UP's operating predecessor in interest, the Oregon-Washington Railroad & Navigation Company (OWR&N).

The SP&S and the OWR&N at one time switched the industries on trackage now operated by Peninsula

but since 1930, SP&S and its parent lines* and the UP have interchanged traffic between themselves and with Peninsula at the North Portland Yard which has an operating capacity of approximately 100 cars.

SP&S and UP have thus served the territory since the turn of the century, and it was only natural that United Stockyards Corporation (United), the non-carrier owner of Peninsula, should seek out these trunk line carriers and offer Peninsula to them at a price set by an independent appraiser. United no longer desires to continue as owner of Peninsula, and the offer was made to SP&S and UP because these carriers are the operating lines which connect and physically interchange traffic with Peninsula.

The close proximity of the Rivergate Industrial District (Rivergate) at the west end of Peninsula's main line and the potential connection of Peninsula with a proposed Rivergate rail system gave rise to unusual carrier, industry and public agency interest in this proceeding. Peninsula owns no tracks within Rivergate although it serves the Crown Zellerbach pole yard from the west end of its main line over industrial tracks owned by Crown Zellerbach (J.S., App. B-5). Rail service into Rivergate from the northeast could be offered via Peninsula or from an adjacent SP&S main line, but the route has not been decided (J.S., App. B-5).

Rail service to Rivergate through its Southwest Gateway is furnished by SP&S and UP for themselves

*Great Northern Railway Company (GN) and Northern Pacific Railway Company (NP), collectively known as the Northern Lines, each owned 50% of the stock in SP&S prior to their merger with other carriers into the Burlington Northern Inc. (BN).

and connecting carriers including SP and Milwaukee, with UP performing the actual switching service. (R 27, Ex. 39,* and J.S., App. B-5).

Appellants' case before the Commission and District Court was based on the assertion that inclusion of Milwaukee and SP in ownership of Peninsula with rights to use intervening track owned and operated by SP&S and UP is necessary to afford a direct physical connection with Peninsula and that this would aid in the development of Rivergate. Following hearing, the Examiner recommended acquisition of an equal interest by SP&S, UP and SP in the common stock of Peninsula and approved acquisition by Milwaukee of an equal interest upon its extension to Portland. The Examiner also recommended that SP and Milwaukee be given access over intervening track to reach Peninsula.

Upon exceptions filed by SP&S and UP and the Brotherhood of Locomotive Engineers (BLE), the Commission found that substitution of SP&S and UP control of Peninsula for that of United, subject only to traffic and labor protective conditions, was in the public interest (J.S., App. B-15, 29).

The Commission's report shows a consideration and weighing of all evidence and arguments and a resulting analysis that, on the whole, appellants' case merely shows a desire for direct service of as many railroads as possible into Rivergate and does not establish a *need* for such service (J.S., App. B-23). This conclusion is

*All similar references are to the complete record before the Commission stipulated by the parties to the three-judge court.

backed by well articulated findings on all evidence of record.

In deciding the merits of the Milwaukee and SP petitions for inclusion and use of terminal facilities, the Commission held that each must meet public interest requirements under the same criteria, and that Milwaukee's petition could not be viewed as a petition to carry out the provisions of Condition No. 24 of the Northern Lines merger (J.S., App. B-18, B-19). *Great Northern Pac. & B. Lines, Merger—Great Northern Ry., etc.*, 328 ICC 460 (1966); 331 ICC 228 (1967), affirmed in *United States v. I.C.C.*, 396 US 491 (1970).

Following its conclusion that the statutes involved must receive uniform application, the Commission focused on the public transportation requirements of the area, finding that since neither SP nor Milwaukee have ever connected with Peninsula, their direct service to Peninsula's industries would constitute a new operation and an invasion of territory (J.S., App. B-20). It found that under such circumstances, sound economic conditions in the transportation industry require that railroads serving the territory be accorded the right to transport all traffic therein they can handle adequately, efficiently and economically before a new operation should be authorized (J.S., App. B-21).

The Commission further decided the SP and Milwaukee invasion could only increase their share of traffic at the expense of SP&S and UP and their employees (J.S., App. B-21), and based on its review of the whole record, the Commission found there was no evidence

to show that SP&S and UP could not handle present and future traffic in the territory adequately, efficiently and economically (J.S., App. B-23). From this and the adverse effect inclusion would have on shippers dependent upon SP&S and UP for service, the Commission found inclusion under Section 5(2) with the accompanying requests for trackage rights under that section would not constitute a just or reasonable term, condition or modification of the SP&S and UP application (J.S., App. B-23). The Commission also concluded, based on the foregoing considerations and the lack of an existing right to connect with Peninsula or to serve Rivergate, that the separate SP Section 3(5) applications should be denied.

The case was presented to the Commission again through petitions for reconsideration and petitions for a finding of General Transportation Importance and these were denied (J.S., App. C and D). After submission on brief and after oral argument before the three-judge court convening in Portland, Oregon, the Commission decision was unanimously affirmed (J.S., App. A).

ARGUMENT

The Jurisdictional Statement and the Memorandum of the United States fail to present any substantial questions which would warrant full argument before this court. Appellants present four separate arguments which deal with the fundamental issues of substantial evidence and adequacy of findings and the correct application of the law. The United States raises another

argument challenging the Commission's refusal to give Milwaukee's application preferential treatment.

Substantial evidence is defined as enough to justify, if a trial were to a jury, a refusal to direct a verdict when the conclusion to be drawn from the evidence is one of fact for the jury. *Illinois Central R. Co. v. N. & W. Ry. Co.*, 385 US 57, 66 (1966).

Adequate findings are presented if the report, read as a whole, sufficiently expresses the conclusions of the Commission, based on supporting data, to enable the court to perform its limited function of review. The Commission report need not deal specifically with each contention of the parties, and its findings may state that matters not specifically discussed have been considered and not found justified when other determinations in the report articulate a basis for decision. *Alabama G.S.R. Co. v. U.S.*, 340 US 216, 228 (1951); *Seaboard Air Line RR v. U.S.*, 268 F Supp 500, 503 (DC Va. 1967).

With respect to the merits of the case, the court will not inquire whether the transaction satisfies its own concept of public interest, the determination of factors relevant to public interest being entrusted by law primarily to the Commission, subject to the standards of the governing statute. *U. S. v. I.C.C., supra*, 396 US at 503.

As we will demonstrate, the arguments pose no other questions and fail to bring forward substantial questions of error on these issues.

1. The Commission correctly applied the legal tests of the Statutes involved within the framework of the evidence before it.

(a) The Commission gave full consideration to the Rivergate area.

Appellants argue that the Commission erroneously restricted its consideration of the public interest by refusing to consider the Rivergate area and its potential in resolving the public interest factor of this case. This is simply not correct, as a reading of the report shows. The evidence of public agencies concentrated on the present and potential transportation needs of Rivergate, and such evidence was fully considered as the following excerpt from the report shows:

> "*Intervenors* — The petitions and applications of Milwaukee, and SP are supported by the Port, the Portland Commission of Public Docks, City of Portland and Oregon Commission. The positions of these intervenors are set forth in excerpts from the Hearing Examiner's report appended hereto and need not be repeated. * * *
>
> ". . . The excerpts describing public agency and shipper intervenors' positions are appended for information only. The positions they reflect are not to be understood as having been adopted by us . . ." (J.S., App. B-11)

The appended material just referred to is found in the Jurisdictional Statement, Appendix B, pages 47 through 55. These pages contain traffic estimates, reference to development costs and all other contentions of public bodies concerning the wish for SP and Milwaukee direct service. The Commission was therefore well aware of the importance appellants placed on the

future of Rivergate and did not in any way ignore Rivergate's potential.

Appellants incorrectly assert:

"As the Rivergate area develops, trackage from Peninsula will be extended to meet the needs of future shippers." (J.S., page 9)

The United States wrongly argues:

"Peninsula's tracks provide one of two rail access routes to Rivergate." (Memo, page 2)

The Commission correctly found that the Port's consultants, in 18 months of study, recommended connection by any Rivergate rail system with adjacent trunk lines and that the connection from the northeast be progressed either as "an SP&S main line extension or an extension of Peninsula's track into the area." (J.S., App. B-5).

Whether Peninsula will ever be used as a means for serving the east end of Rivergate was never substantiated on the record. The Port witnesses refused to state any preference for service into Rivergate via Peninsula (Tr. 602-603), and evidence presented by SP&S and UP showed that the Port's consultants recommended a rail system which connected with the SP&S main line (R 27, Ex. 28, page 6).

The Commission's focus on Peninsula (which in the context of this decision means the Peninsula-Rivergate area) instead of the whole Portland area was the only course available since appellants' evidence dealt almost solely with this territory. No consideration could be given to exact rail traffic patterns in the greater Port-

land area or in the separate rail yards and terminals of all carriers in the case because there was no evidence on this point. The Examiner had to go far beyond the record to conclude that the whole Portland area was one terminal transportation entity, and the Commission was merely bringing the case into line with the evidence before it when it focused on the needs and desires of the Peninsula-Rivergate area.

(b) Treatment of entire Portland territory as one transportation terminal entity is unsupported by evidence and could give rise to prolonged litigation.

Aside from the lack of evidence to support treatment of the Portland territory as one terminal transportation entity, attempts by SP and Milwaukee to extend service to stations and industries on lines of other railroads amply support the Commission's concern that more problems and litigation, disrupting the growth and development of Portland, would follow adoption of the Examiner's conclusion than the "divisive determinations" he feared (J.S., App. B-20).

The report shows the Commission was considering the Section 3(5) as well as the Section 5(2) requests of SP and Milwaukee when it rejected the Examiner's erroneous premise. The first paragraph addressed to the *Merits of petitions for inclusion* (J.S., App. B-18) show this:

> "We possess the necessary jurisdiction *to require inclusion* (under Section 5(2)) . . . and to authorize the common use of terminals (under Section 3(5)) . . . ." (Emphasis added.)

The Commission therefore had the relief sought under both sections in mind when three paragraphs later it rejected the one terminal entity theory for the reasons therein noted (J.S., App. B-20).

Appellants are wrong when they say only under Section 5(2) proceedings can a carrier seek to serve stations and industries on lines of other carriers (J.S., page 12). In this instant case, both intervening railroads sought to reach North Portland and tracks of Peninsula under provisions of Section 3(5). (See pleadings R 4, R 8, R 10, R 19).

The Commission also correctly found:

> "SP asks that it be authorized to use the UP trackage under Section 3(5) of the Act in the *event either or both of the joint applicants decline to participate in the acquisition of Peninsula subject to the conditions SP requests.*" (J.S. App. B-9) (Emphasis added.)

All of this illustrates that if Portland could be considered to be "one transportation terminal entity," carriers in that undefined geographic area would use Section 3(5) to reach through yards and terminals and over main line tracks of other lines to invade stations and industries serviced by other railroads without regard to the disruption and interference such invasion might create. The existence of a definite unified terminal operation within a defined area normally must be established before the powers under Section 3(5) are invoked. *Chicago & Alton R.R. Co. v. T., P. & W. Ry. Co.*, 146 ICC 171, 178-179 (1928).

Appellants inaccurately argue (J.S., pages 12-13) that SP "never asserted that its mere presence" gave it the right to serve all stations or industries anywhere within the Portland area. In SP's reply to exception 6 (R 41, page 38), SP contended that the issue of full trackage rights over the involved UP main line was before the Commission under one of its Section 3(5) applications. Thus, SP strenuously sought rights, under the factual setting of this case, to serve all stations and industries within an undefined geographic area in Portland.

Later, in its petition for reconsideration (R 49, page 42), SP retreated from this position claiming that it sought merely "bridge rights" under the same application. This SP action is notice enough of the dangers foreseen by the Commission when it correctly assessed the adverse effect of a "one transportation terminal entity" conclusion.

2. The Commission correctly found SP&S and UP service to and from Peninsula to be adequate and efficient.

Applicants incorrectly infer (J.S., page 14) that granting of SP and Milwaukee inclusion will permit them to "serve industries in the developing Rivergate area." As we pointed out before (page 9, supra), the Commission correctly found that Peninsula is one of two possible access routes into the northeast part of Rivergate. SP and Milwaukee inclusion as owners of Peninsula will therefore not insure their direct access to the territory they already serve via connections nor will it cause Peninsula to extend into Rivergate since many

physical impediments make Peninsula's use inferior to an extension from the SP&S main line.*

In deciding the public interest facets of this case, the Commission found that service to the Peninsula-Rivergate territory would be unaffected by passing of control from United to joint applicants who connect with Peninsula (J.S., App. B-5). The Commission also found that evidence offered by shippers supporting SP's position as well as evidence offered by SP and Milwaukee themselves failed to establish that joint applicants, through control of Peninsula, cannot handle present and future traffic in the Peninsula territory adequately, efficiently and economically (J.S., App. B-23). This finding is on an issue raised by appellant rail carriers and their evidence was determined insufficient.

Now appellants ask this court to reweigh evidence, contending that not a single shipper supported the Commission's conclusion (see J.S., page 15). The report shows the contrary with the Commission reviewing all the shipper testimony (J.S., App. B-21-23) and among other things correctly finding that "... only three of the thirteen shippers located on Peninsula's line participated in these proceedings and they supported the applicants." (J.S., App. B-21).

Appellants again misstate the evidence by characterizing an approximately 30-hour time lapse from the SP-UP interchange to the UP-Peninsula interchange at North Portland as time required to move a car 5.2 miles (J.S., page 15).

*Heavy curvature, impaired clearances and low standard track make use of Peninsula as an access route highly questionable (J.S., App. B-36).

The 30-hour time lapse is the time required to perform all railroad functions in the interchange of Peninsula traffic including yarding, sorting, inspecting, switching and moving via the Kenton industrial area of UP to North Portland (Tr. 244). The UP—"Kenton Turn" is used in handling North Portland traffic because the same engine is used to pick up and set out the Kenton traffic to be interchanged at North Portland with the SP&S and parent lines. The Kenton engine also handles SP and UP traffic to be interchanged with Peninsula at North Portland, this being the most economical and efficient service considering the traffic level involved (Tr. 247).

The evidence is undisputed that when direct service is required, the Peninsula traffic is handled directly to North Portland without taking the Kenton route (Tr. 245-256). Since around 61% of the 7,600 to 8,600 carloads annually interchanged at North Portland* originate or terminate at Kenton industries, the method just noted affords the most economical service consistent with present needs and assures four SP&S and two UP pickups and setouts daily (J.S., App. B-36).

SP's Traffic Manager failed to support that carrier's contention that it would offer better service (Tr. 535-536), basically because railroading necessary to prepare its traffic for interchange would merely be transferred from UP forces to those of SP. If appellants' position is adopted, the work now done by two railroads would be

*Of the remaining, 3,640 cars in 1966 and 2,748 cars in 1967, SP shared 20% and 17%, respectively, through connections and use of joint rates and routes. Milwaukee's share was about 1% each year (J.S., App. B-21).

performed by four carriers in a wasteful duplication of service adversely affecting shippers depending on all railroads.

No Peninsula shippers complained that present service is inadequate, and the station agent who is in direct daily contact with shippers and receivers had only six or eight complaints a year (Tr. 76-77).

Crown Zellerbach, who supported appellants' proposals, experienced no unusual delays at their Peninsula facility (Tr. 318-319). Other shippers supporting SP were located in South Rivergate, and their testimony could in no way bear on service via Peninsula as they had not experienced any such service (J.S., App. B-22-23).

SP's Traffic Manager claimed service deficiencies yet could not state how many or when complaints were received and failed to follow up on them (Tr. 533-534). Neither the UP General Manager nor the UP Assistant Superintendent had received complaints on service (Tr. 182, 759 and 763).

As to SP's Exhibit 45, a study conceived and prepared by SP in an effort to show poor service—not by shippers or consignees complaining of existing service—numerous cars were mishandled because of inadequate information forwarded by SP (Tr. 760-761); numerous cars were received on Friday and not physically spotted until just before the next working day (Tr. 762); and at least three were tendered empty and spotted ahead of the date they were ordered (Tr. 763-764). The exhibit

therefore fails to support SP's contention that service is inadequate.

Crown Zellerbach's petition for reconsideration (R 48) relied on a letter describing service between its facility in South Rivergate and Albina via the UP Barnes Yard, an area Peninsula cannot reach. The letter simply traces the procedure to be followed in handling SP cars from time of order to time of return. It said that when in excess of 25 outbound cars are tendered, UP will run a direct transfer move, otherwise, UP crews will perform additional work en route. Conspicuous in its absence is any response from Crown Zellerbach stating how the service failed its needs. Also conspicuously missing is any commitment from SP for service via Peninsula or any other route to satisfy Crown Zellerbach's concern.

The above resume shows substantial evidence to support the Commission's findings concerning the adequate and efficient service furnished by appellees.

3. The Commission correctly construed Section 3(5) of the Interstate Commerce Act and properly rejected the two SP applications filed pursuant thereto.

The Commission rejected the SP applications under Section 3(5) because the intent of Congress in enacting that section sought to provide a method of avoiding "unnecessary expense in duplicating existing terminal facilities by a railroad entitled to serve a particular territory." (J.S., App. B-24)

Besides the cases cited by the Commission (J.S., App. B-24) in support of its conclusion, many decisions

have held, consistent with the National Transportation Policy, that duplication of terminal services is contrary to the public interest, especially when railroads generally are having financial difficulties and the proposed service is not needed. See, as example, *Competitive Produce Terminals at Denver, Colorado*, 235 ICC 699, 713 (1940). In fact, most denials of Section 3(5) applications have been based on an unwarranted duplication of effort in light of service available and the use already made of terminal and main line track by owning lines. See, as examples, *York Mfgrs. Assn. v. P.R.R. Co.*, 73 ICC 40, 50 (1922); *Port Arthur C. of C. v. T. & F.S. Ry. Co.*, 73 ICC 361, 364 (1922); *Hastings Commercial Club, et al. v. C., M. & St. P. Ry. Co.*, 107 ICC 208, 216 (1926); *Muskegon Ry. & Nav. Co. v. Pere M. Ry. Co.*, 148 ICC 653, 661 (1928); *Southern Pac. Co. v. Atchison, T. & S.F. Ry. Co.*, 188 ICC 557, 560 (1932); *Jamestown, N.Y., C. of C. v. Jamestown W. & N.W.R. Co.*, 195 ICC 289, 292 (1933); and *City of Hialeah, Fla. v. Fla. East Coast Ry. Co.*, 317 ICC 34, 36, 37 (1962).

Appellants do not challenge the Commission rationale in denying the Section 3(5) applications, i.e. avoidance of wasteful duplication, but claim instead "failure to deal" with one of the two SP applications (J.S. page 17).

Both applications were, in effect, merged into one when, on the record, SP counsel stated that under Finance Docket No. 24890, SP did not seek to use Peninsula trackage (Tr. 406-411). With this clarification, both SP Section 3(5) applications sought the same re-

lief, which SP finally denominated to be bridge rights over UP track as "terminal facilities" (R 49, page 42).

The Commission, nonetheless, still dealt with each Section 3(5) application, noting they were filed because of the permissive nature of authorizations under Section 5(2), and deciding the ultimate issues under the Section 3(5) applications after fully considering contentions as to fact and law under both of them (J.S., App. B-9, 10, 24 and 29).

Use of Northern Pacific's Tracks at Seattle by Great Northern, 161 ICC 699 (1930), makes no reference to joint ownership of terminal facilities as a necessary prerequisite to invoking Section 3(5) as appellants infer. In that case, the Commission plainly concluded, however, that had Great Northern not already served the Lake Union-Terry Avenue District, its use of connecting track would amount to an extension of line into new territory requiring a certificate of convenience and necessity under Section 1(18) of the Act (161 ICC at 704).

Seaboard Air Line RR—Use of Terminals, 327 ICC 1 (1965), 267 F Supp 986, affirmed per curiam 386 US 8, was based on the need to continue service to a port, and the carrier acquiring common use of terminal facilities under Section 3(5) was permitted to continue to render the same service in the new location without invading another railroad's territory.

Appellants' argument that, if followed to its logical conclusion, *Seaboard, supra*, calls for a "follow the traffic" concept, may be correct. Needless to say, such concept is no stranger to transportation law. See *Smith and*

Solomon Trucking Co., Extension—Camden, N. J., 61 MCC 748 (1953), and *Smith and Solomon Trucking Co. v. U.S.*, 120 F Supp 277 (DC NJ 1954).

Erie R. Co. Acquisition, 275 ICC 679 (1950) cited by appellants strengthens the conclusion they seek to overturn. In that case Erie wished to assume rights over ¾ of a mile of the New York Central's main line over which the International Railway had operated. Central objected to the assignment of its trackage agreement and declined to make a similar agreement with Erie. Approval of the Section 3(5) application permitted the continuation of the same existing service and did not, as in the instant proceeding, involve an invasion of territory.

The cases all stand for the same proposition, and in each instance no *new service* was authorized or duplicative service instituted on the pretext of a Section 3(5) terminal use. They form no support for Appellant's argument.

4. The Commission's approval of the SP&S and UP applications subject only to traffic and labor conditions is in all respects lawful and does not constitute a violation of the antitrust laws.

The statute here involved, Section 5(11) of the Act, exempts corporate affiliations considered and approved under Section 5(2) from Anti-trust Laws where the Commission makes adequate findings that such affiliation is consistent with the public interest, and where such findings are adequately supported by the evidence.

McLean Trucking Co. v. U.S., 321 US 67 (1944), says that the Commission is "to estimate the scope and appraise the effects of the curtailment of competition and consider them along with advantages of improved service, safer operation, lower costs, etc." (321 US at 87). Other cases cited in the United States memorandum say basically the same thing.

The point here which the appellants and government both ignore is that the Commission correctly found that there would be *no* change in competition. Joint applicants' competitive position will not be enhanced by ownership of Peninsula stock. They now connect with Peninsula and will continue to do so. Peninsula now switches its own industries and will continue to do so. Rates and routes are now open to Milwaukee and SP, will be continued, and no other competitive relationships will be changed.

Maintenance of the status quo is the optimum status that could be had when a question of curtailment of competition is at issue. Once this has been determined, there seems to be little need to recite anything further under the requirements of Section 5(11) or cases construing it. Naturally, each case must be judged on its own merits and here, as the following resume shows, the Commission's decision as a whole provides all findings required by Section 5, including Section 5(11).

The Commission correctly concluded that service by Peninsula to industries will be unaffected by the substitution of joint applicants' control for that of United (J.S., App. B-15); that litigation and disruption in

growth and development of the area would be more likely under four-way ownership than under two-way ownership (J.S., App. B-20); that passage of control to applicants is consistent with past and present service rendered in the Peninsula area and that joint applicants have the ability to fulfill future requirements (J.S., App. B-15 & 23); that participation in handling of present and future traffic of SP and Milwaukee as connecting lines can be maintained with the least disruption to applicants and their employees by granting only the SP&S and UP application (J.S., App. B-21-23); and that evidence of shippers and public agencies has failed to establish a present or future need for either SP or Milwaukee ownership of or connection with Peninsula (J.S., App. B-21-23).

To further protect interests of the public (including public agencies, shippers and carriers), the Commission found that Peninsula's present routes and interchange should remain unchanged and to insure this, at the suggestion of joint applicants, the Commission prescribed traffic conditions, modified not only to cover Peninsula but also SP&S and UP* (J.S., App. B-25-26).

The Commission also imposed the "New Orleans" labor protective conditions as requested by the intervening Brotherhood of Locomotive Engineers with a special arbitration provision (J.S., App. B-26-27).

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*The government incorrectly infers, as did appellants, that the Commission approved the "unconditioned acquisition of Peninsula" (Memo, page 9). The foregoing demonstrates that the Commission took extra precautions to maintain a competitive situation which the Commission found would remain unchanged.

The government's argument that Milwaukee and SP inclusion would not involve an invasion of territory simply has no legs on which to stand (Memo, page 11). Neither Milwaukee nor SP has ever directly served the Peninsula-Rivergate territory though each freely participates in traffic to and from all of this area as connecting lines. Physical access over tracks of SP&S and UP requested as part of inclusion is simply neither feasible nor justified on this record, but full access as connecting lines has never been resisted or denied by joint applicants.

The financial weakness of Milwaukee was never a major evidentiary fact of record in this case and the lack of citations when arguing this point substantiates this. By the same token Milwaukee, who is an appellant herein, has not pushed this argument with the zeal evidenced by the United States, which of itself raises doubt as to its propriety.

Needless to say, even in cases where fully proved, such an economic factor is but one facet of the complex public interest decision which Congress and the courts agree is for the Commission to make, based on evidence before that agency.

For the foregoing reasons, the Commission completed its function under Section 5 and complied in all respects with paragraph 11 thereof, as interpreted by the *McLean* case and other decisions in point, and the contentions of the parties to the contrary raise no substantial issue.

5. The Commission correctly decided the Milwaukee's application on the same basis as other applications before it.

The United States suggests that the Milwaukee application should have been given preferential treatment by the Commission. It urges that Condition 24(a) of the Northern Lines merger case and not the evidence before the Commission in this proceeding should control. The portions of the report the government claims erroneous read:

> "With respect to Milwaukee's petition, we wish to point out that this case cannot be viewed as part of the general realignment of western railroad competition resulting from the Commission's approval of the *Northern Lines* merger. Condition No. 24 of the *Northern Lines* case grants Milwaukee the right of access to Portland and the right to serve industries therein; however, this condition is applicable only to *Northern Lines* trackage and territory. The condition is silent with respect to trackage and territory in which other carriers, such as UP, have a joint interest and the effect of the condition upon such joint trackage and territory was not presented to, nor considered by, the Commission. Furthermore, the instant application and Milwaukee's petition for inclusion therein, were not filed until after the record was closed in the *Northern Lines* case and not until long after the *Northern Lines* applicants had agreed to Milwaukee's request for imposition of condition No. 24. Thus, the purchase of Peninsula by the joint applicants was not within the contemplation of the Commission at the time condition No. 24 was imposed. Milwaukee's inclusion in that purchase cannot, therefore, be considered to implement that condition; and a denial of its petition for inclusion would take nothing from Milwaukee that it was granted in the *Northern Lines* case nor be contrary in any way to the spirit and intent of the Commission to accord Milwaukee the right of access into Portland over *Northern*

> *Lines* trackage. Accordingly, we consider the petition of Milwaukee under the same public interest criteria as the petition and applications of SP, rather than as a petition to carry out the provisions of condition No. 24." (J.S., App. B-19)

The United States correctly states that Condition 24(a) was a product of an agreement between Milwaukee and the Northern Lines as were all conditions between those parties in that case (Memo, page 5). Neither Condition 24(a) nor the underlying contract expressly require Milwaukee's admission to all industries and interchanges in the Portland area.

There are numerous other interchange points and yards in Portland partly owned by the Northern Lines, and none of the other owning carriers have ever been given to believe that Condition 24(a) was intended to cover such facilities. If the government's argument is correct, logically Milwaukee could use all such points. Not even Milwaukee has ever contended this broad an application of condition 24(a).

The contract behind Condition 24(a) was placed in evidence by Milwaukee as an attachment to Exhibit 53 (R27, Exhibit 53). It provides in part:

> "To the extent that Nu-Co. or SP&S can do so, it will grant to Milwaukee trackage rights *over present Northern Pacific and SP&S tracks* between Longview Junction, Washington, and Portland, Oregon, including all main, second, passing and industry tracks and over SP&S tracks in the D Line Valuation area in Portland." (emphasis added)

At no time has there ever been any misconception by Milwaukee of what rights it would obtain under Con-

dition 24(a). As illustrated above, the contract which it voluntarily made implementing this condition with respect to its entry to Portland limits the trackage rights it will receive to trackage owned by the merged company and SP&S. Consequently, the Commission's finding that Condition 24(a) is applicable to Northern Lines trackage and territory is plainly correct.

Since the Commission's decision in this case in no way modifies or limits the right which the Commission said Milwaukee should receive when it established Condition 24(a) and which Milwaukee itself expected to receive under the Northern Lines merger, there is no merit to any argument advanced by the United States based on the decision in the Northern Line case or the imposition of Condition 24(a) in that case.

Any interpretation of the application of Condition 24(a) should be based on the record in the Northern Lines case and this is what the Commission specifically left open to the Milwaukee in this case when it held, in a footnote:

> "Upon completion of litigation in the Northern Lines case and consummation of that merger, Milwaukee may wish to seek relief from the Commission in that proceeding to determine the relationship of Condition No. 24, if any, to Peninsula's track which would at that time be partially owned by the Northern Lines." (J.S., App. B-19)

The Government's contention that this decision effectively denies Milwaukee an opportunity to compete for Rivergate traffic is without merit. As noted in the prior section, the present service of Peninsula will be

unaffected and Peninsula's present routings and interchanges will be maintained, unchanged by joint applicants. Traffic conditions suggested and accepted by joint applicants insure this (J.S., App. B-25-26). Further, joint applicants stand committed on the record of this case to maintain open rates and routes that now exist and treat all future requests without discrimination or partiality (R 27, Ex. 29, page 2-3). This same protection is afforded under Section 3(4) of the Act (49 USC 3(4)). Relief may be sought through complaints to the Commission under Section 13 of the Act (49 USC 13).

Had the Commission or the lower court accepted the Government's argument, a substantial preference would have been afforded Milwaukee over SP&S, UP and SP, all carriers who had to make their case on the instant record and not benefit from conditions imposed in another proceeding. No error, therefore, exists in rejecting the government's contentions just noted.

Apparently the Government has misread the Commission report when it presumes that Condition 24(a) could be implemented "but for the fact that Burlington Northern joined Union Pacific with it in its take over of Peninsula." (Memo, page 7). This is patently incorrect since the Commission's refusal to treat Milwaukee inclusion as a special right as the Government contends it should (Memo, page 9) came from the fact that Condition 24 plainly applied only to BN property.

The Government may mistakenly believe Milwaukee planned to operate trains and engines over Peninsula or

take Peninsula trackage in its own name (Memo, page 8, fn.). This, too, is incorrect since the right to purchase stock is all that was sought by anyone in this proceeding, and this alone could not give Milwaukee rights to run trains on Peninsula trackage including the jointly owned interchange trackage in the North Portland Yard.

In light of the foregoing, the Government's contention that Condition 24(a) should be used as *the* basis for granting Milwaukee's applications, suggests the grossest conceivable form of arbitrary and unreasonable conduct. Joint applicants submit this point raises no substantial issue which would warrant further consideration by this court.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be affirmed.

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